MURUAN & ANOR. v. JABOL

[C.A. (Thomson C.J., Hill and Good JJ.A.) May 17, 1962]

[J.B. — F.M. Civil Appeal No. 42 of 1961]

Land Laws — Purchase of two undivided half-shares — Registration and sale of one undivided half-share — No transfer of the other half-share — Claim for declaration that plaintiff owner of unregistered half-share — Property registered in name of stranger — Effect of s.29A of Johore Land Enactment — Indefeasibility of stranger's title except as provided under section.

This was an appeal from the decision of Adams J. ([1962] M.L.J. 45) wherein judgment was given for the respondent that he was owner of an undivided half share in a plot of land in Batu Pahat. In the opinion of the trial Court there was evidence to establish that the plaintiff (respondent on this appeal) bought the land from one Siti Hadijah and her brother Masuan in 1943 and that subsequently the plaintiff obtained a transfer to his own name of the undivided half share belonging to Siti Hadijah and there was no dispute with regard to this undivided half share. With regard to the other undivided share it was not clear whether a registration had been effected into his own name by the plaintiff.

Held: with regard to the disputed half share, the decision must turn on the provisions of section 29A of the Johore Land Enactment. The relevant questions were therefore, (i) who was the registered proprietor of the undivided half share on the date the writ was issued and (ii) if it was someone other than the plaintiff whether the proprietor was proved a party to any fraud or misrepresentation, or whether the registration was obtained by forgery or by means of an insufficient or void instrument. As the evidence disclosed that the second appellant was the registered proprietor and as there was no evidence of fraud, misrepresentation or forgery, the title of the second appellant was indefeasible and the plaintiff's claim must fail.

Per curiam: In a dispute regarding title to land the court should call for the issue document of title.

COURT OF APPEAL.

R. Ramason for the appellants.

John Pillai (*N. K. Stoner* with him) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: I have had the benefit of reading the judgment of Good J.A. and agree with everything he says.

In my view it was perhaps unfortunate that the case was tried by a Judge who clearly was not very familiar with the local land law of Johore. At the trial counsel for the plaintiff does not seem to have been at any great pains to enlighten him and as the defendants were unrepresented it is not surprising that the result of the trial was unsatisfactory.

I have no desire to repeat what has been said by Good J.A. I must, however, re-echo his amazement that the case should have been tried out without the production of the document of title to the land.

Hill J.A.: I have read the judgment of my learned brother Good and agree that the appeal should be allowed and the order of the 6th December, 1961, set aside. I also agree with the proposed order regarding costs.

At one time I was inclined to the view, on account of the somewhat unsatisfactory and confused hearing in the lower court, that a fresh hearing would be the best course, but it is clear that, if only one thing was established by the evidence at the hearing, it is that the 2nd appellant is the registered proprietor of the land in question. Further, whatever part the 1st appellant may have played in the past, Adams J. found that allegations of fraud against him had not been proved. It seems clear therefore that a declaration of the nature sought by the respondent is the one remedy to which he is not entitled.

Good J.A.: This is an appeal from the judgment of Adams J. given on the 2nd December, 1961 in Muar Civil Suit No. 2 of 1961.

The present respondent was the plaintiff in the action and the present appellants were the defendants. The plaintiff was represented by counsel but the defendants were not.

The plaintiff's claim was for a declaration that he is the owner of an undivided half share in the land held under S.S. No. 742/17 in Mukim Sri Gading VIII in the District of Batu Pahat and held under A.O. No. 3559; for a declaration that the first defendant has no right title estate or interest in the said land (I omit reference at this stage to fraud and misrepresentation which were alleged against him); and for consequential directions to give effect to the declarations sought.

Judgment was given for the plaintiff except on the allegation of fraud. Against that judgment the defendants now appeal.

Counsel for the plaintiff opened his case by tracing the devolution of the land from the original sole registered proprietor in 1917 to the present registered proprietors. He no doubt had the advantage, which was denied to the learned trial Judge and which has been denied to us, of having inspected the title, so that he could speak with knowledge and authority of matters which, so far as this Court is concerned, are hidden in obscurity and doubt. The second witness for the plaintiff, who was the Assistant Collector of Land Revenue, Batu Pahat, if properly examined could from his Land Office records have given evidence confirming and illuminating counsel's statement of the facts, but his evidence is full of gaps and leaves much of counsel's statement in the air. Speaking for myself, I find it incomprehensible that in a dispute regarding title to land the issue document of title was neither produced nor called for. No inquiry was made as to its whereabouts and there is not a scrap of evidence to show who has possession of it.

The case has been further confused by uncertainty about the admission of one of the documentary exhibits. At pages 31 and 32 of the appeal record is a certified true copy of the notes of an inquiry held by the Collector of Land Revenue, Batu Pahat on an application made to him by the first appellant for rectification of name, that is, the substitution of his name for the name "Masuan bin Talib", in the register.

We were told from the Bar that this was not put in evidence, and the fact that it is not marked with an exhibit number is *prima facie* confirmation that it was not admitted as an exhibit. It is at all events clear that the learned trial Judge did not see it.

At page 32 is a certified true copy of the notes of an earlier inquiry purporting to have been held by one "A. Ramsay" (who has not seen fit to vouchsafe his official title) and which is undated, but referenced as "L.C. 8/26" which presumably means Land Case No. 8 of 1926. This document was admitted and marked as Exhibit P.3, which indicates that it was produced by one of the plaintiff's witnesses.

When the Assistant Collector (P.W.2) was giving evidence, he said:

> "There was an application by a person calling himself Maruan bin Hassan to rectify the name in A.O. 2460 (I/Card J. 349081) under section 42, Land Enact.
>
> P. 3 is a certified copy of the evidence taken."

The document marked P. 3 is certainly not a copy of the evidence taken on an application by a person named Maruan bin Hassan for rectification of a name on a title. It is a copy of the evidence taken on an application by Siti Hadijah binti Talib (the first appellant's mother) to have the names of herself and the first appellant registered as proprietors of land described as "E.M.R. 516" in place of Hassan (her husband and the first appellant's father) deceased.

If the learned trial Judge had seen the document which is reproduced at pages 30 and 31 he would have realised that it was that document to which P.W. 2 was referring, and that the document at page 32 was an annexure to it and is referred to in it as "copy attached."

The question of the provenance of the document at pages 30 and 31 was referred to the learned trial Judge some months after he had given his judgment, when it was made known to him that it had been found in the courtroom the day after he had finished taking evidence. He decided, in my opinion quite rightly, that he could do nothing further at that stage.

It is now clear that the document in question became detached from its annexure after the Assistant Collector had identified it, and that only the annexure was handed in and marked as an exhibit.

The second appellant has filed an affidavit in which he states that at the trial he tendered a document, identifiable as this document, in evidence. This is a mystery, that cannot now be solved. It is clear from the Assistant Collector's evidence that the document which he identified must have been handed to him by the plaintiff's counsel, since the evidence came out in examination in chief. Whether counsel obtained it from the second appellant is not and cannot now be known. It is a certified copy of a public document, and it is possible that the second appellant had a copy of his own which he intended, but through ignorance of Court procedure failed, to put in.

I have considered whether this Court, in exercise of its powers under section 38(1) of the Courts Ordinance, 1948, ought to receive the document at pages 30 and 31 as further evidence, or ought to order a retrial to enable it to be put in evidence and considered by the trial Judge. If it were necessary I would be inclined to the view that a new trial would be the most satisfactory course; but for reasons that will soon appear I do not think that it is necessary.

The evidence as to the devolution of the land in question from registered proprietor to registered proprietor is given by the Assistant Collector as follows:

> (a) In 1936 it was registered in the names of Siti Hadijah binti Talib and Masuan (or Masuran — the writing is said to be not quite clear) bin Talib jointly. Masuan bin Talib appears from other evidence to be the name of Siti Hadijah's brother.
>
> (b) In 1954 it was registered in the names of Tor Cheng Teng and Masuan bin Talib (and there is other evidence that Tor Cheng Teng bought an undivided half share from the plaintiff in 1954).
>
> (c) At the date of the trial it was registered in the names of Tor and the second appellant.

Two links are missing in the chain of evidence:

> (i) Evidence as to whether the plaintiff ever came on the register as the registered owner of an undivided half share. He says he bought the whole of the land from Siti Hadijah binti Talib and Masuan bin Talib in 1943, and this is corroborated by the Assistant Penghulu of Mukim VIII (P.W. 3) who says he was present at the transaction. The plaintiff says he obtained a transfer of her share from Siti Hadijah some time between 1952 and 1954 (when he sold it to Tor) but he does not say, and no other witness says, whether that transfer was ever registered. It seems that it must have been, and that the plaintiff was on the register for a short period as successor in title to Siti Hadijah, as otherwise he would have been unable to perfect the sale to Tor Cheng Teng by registered transfer. The plaintiff does not state in terms that he did not obtain a transfer of the other half share from Masuan, but he implies that he did not when he says: "The title should be in the name of Tor Cheng Teng and Masuan bin Talib". Masuan had gone to live in Indonesia and the inference is that the plaintiff was unable to have the transfer effected.
>
> (ii) Evidence as to how the first appellant came to be on the register, so as to enable him to transfer the half share, previously registered in the name of Masuan bin Talib, to the second appellant in 1958. This would have been clear if pages 30 and 31 had been in evidence.

The learned trial Judge held that the plaintiff was the owner of an undivided half share with Tor Cheng Teng (meaning, I take it, with Tor Cheng Teng as the owner of the other undivided half share"). His finding is as follows:

> "In my view the evidence of the plaintiff and Naib Mohd. are true and the plaintiff is the undoubted owner of an undivided half share of the said land with Tor Cheng Teng."

This, with respect, is a *non sequitur*. It does not follow that, because the evidence of the plaintiff and the Assistant Penghulu is true, the plaintiff is the owner of the land. All that their evidence amounts to is that the plaintiff bought the land from the registered proprietors Siti Hadijah and her brother Masuan in 1943, that he subsequently obtained a transfer of an undivided half share from Siti Hadijah (which he transferred to Tor Cheng Teng), and that he claims to be the owner,

though not the registered proprietor, of the other half share which the first appellant sold to the second appellant in 1958.

The question for decision is not whether the half share in question was once registered in the name of Masuan bin Talib, or whether the plaintiff purchased it from Masuan. There are two questions, and two questions only, to be decided:

(1) Disregarding Tor Cheng Teng's half share, which is not in question, who was the registered proprietor of the other half share when the writ was issued?

(2) If the registered proprietor when the writ was issued was not the plaintiff, but X, was X proved to have been a party to any fraud or misrepresentation, or was the registration of X obtained by forgery or by means of an insufficient or void instrument?

These questions arise from the provisions of section 29A of the Johore Land Enactment, the first four subsections of which are as follows:

29A. (i) Notwithstanding anything elsewhere contained, the title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.

(iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void.

(iv) Nothing in sub-sections (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him.

(Subsection (v) is irrelevant).

The answer to question (1) is to be found in two places: in the evidence of the Assistant Collector, P.W. 2, where he says, in answer to the only question put to him in cross-examination (which was put by the second appellant), "In A.O. 3559 the land is registered in your name with Tor"; and in the evidence of the second appellant, where he says, in examination in chief, "I am now on the title as the owner". This evidence as to an existing state of affairs was not challenged, and the second appellant was not cross-examined on it. The learned trial Judge ought to have found as a fact that the second appellant was the registered proprietor of the disputed half share, a question to which he does not appear to have addressed his mind as he does not mention the second appellant in his judgment at all.

The answer to question (2) is that there is no evidence, indeed it was never pleaded, that the second appellant was a party to any fraud or misrepresentation. Fraud and misrepresentation were alleged against the first appellant and the learned trial Judge ordered that the allegation must be struck out, which amounts to a finding that it was not proved. Even if it had been proved, it would not have operated to defeat the title of the second appellant unless it was also proved that he was a party to the fraud and misrepresentation.

There was no evidence of any of the matters referred to in subsection (iii) of section 29A, nor could there have been without amendment of the statement of claim as they were not pleaded.

Section 29A was not mentioned anywhere in the proceedings nor does the learned trial Judge appear to have considered it. This is no doubt one of the unfortunate consequences of the appellants having been unrepresented.

I would allow the appeal and set aside the order of the 6th December, 1961. I would order that the respondent pay the taxed costs of the appellants here and in the Court below.

Appeal allowed.

Solicitors: *R. Ramason; Pillai & Co.*

AZRO v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.)
May 22, 1962]

[Penang — F.M. Criminal Appeal No. 11 of 1962]

Criminal Law and Procedure — Murder — Penal Code, s.302 — Defence of insanity — Whether direction of trial judge proper.

The appellant was convicted at Muar of murder in contravention of section 302 of the Penal Code. The only defence that was put forward at the trial was the defence of insanity and the only grounds of his appeal in this case were (a) the jury were not given a proper direction on the subject and (b) the judge would appear to have told the jury that subject to his direction and in applying his direction there was no evidence to which the tests laid down by him could be applied.

Held: (1) the trial judge's direction to the jury complied with what was said in *Baharom* v. *Public Prosecutor* (4); *R.* v. *Sodeman* (1) and *R.* v. *Carr-Briant* (2);

(2) the trial judge nowhere in the course of his direction ruled that as a matter of law there was no evidence on which the jury could bring in a verdict of not guilty on account of insanity. A mere expression of opinion that the evidence did not make out the defence of insanity did not amount to misdirection.

Cases referred to:—

(1) *R.* v. *Sodeman* [1936] 2 All E.R. 1138.
(2) *R.* v. *Carr-Briant* [1943] K.B. 607.
(3) *Chia Chan Bah* v. *The King* [1938] M.L.J. 147.
(4) *Baharom* v. *Public Prosecutor* [1960] M.L.J. 249.

COURT OF APPEAL.

A. Jayadeva for the appellant.

H. Sankey (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was convicted at Muar for murder in contravention of section 302 of the Penal Code. The offence was said to have been committed in the early morning of 8th August in a house in the village of Parit Raja near Batu Pahat.

It is unnecessary to discuss the facts at any great length because it was proved up to the hilt, and indeed never denied that the appellant killed a man named Mir Afzalshah by stabbing